



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 21, 1996

Ms. Nora A. Linares
Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR96-1905

Dear Ms. Linares:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 100742.

The Texas Lottery Commission (the "commission") received requests for a variety of information, including documents concerning GTECH Corporation. You contend that some of the documents are personal notes that are not subject to the provisions of chapter 552 of the Government Code. You also assert that certain documents are excepted from disclosure pursuant to sections 552.104, 552.107, 552.110, and 552.111 of the Government Code. You have submitted the responsive documents that are at issue to this office for review.

The documents you contend are not subject to chapter 552 are "notes that were made solely for the note-taker's own information purposes" and which were kept "in the note-taker's own personal time-keeper." These notes are marked as Exhibit A. You explain that some of the handwritten entries were made by the individual who kept the notes and the other entries were made by an administrative assistant. Information is generally subject to chapter 552 when it is held by a governmental body and relates to the official business of a governmental body or is used by a public official or employee in the performance of official duties. Open Records Decision No. 635 (1995) at 4; *see also* Open Records Decision Nos. 626 (1994) at 2 (in determining that handwritten notes were subject to the Open Records Act, "[i]t is immaterial under the act whether an official who holds records regarding official business has discretion to generate or maintain these records"); 327 (1982) at 2 (notes made by public servants in their official capacities and maintained in governmental body's files were subject to Open Records Act).

We have reviewed the handwritten notes at issue, which appear to generally concern official commission business and conclude that these notes are subject to chapter 552 of the Government Code. *See* Open Records Decision No. 635 (1995) at 6 (factors that help determine whether calendar is subject to chapter 552 include "the presence of significant commission-related entries in the calendar" and fact that public employee helped maintain calendar).

Your letter states that even if the Exhibit A documents are subject to chapter 552, they are excepted from disclosure to the requestor pursuant to the section 552.111 exception. Section 552.111 excepts from disclosure inter-agency or intra-agency communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body. *See Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ); Open Records Decision No. 615 (1993) at 5. We agree that the handwritten notes at issue reflect the deliberative or policymaking processes of the commission and may be withheld from disclosure pursuant to section 552.111

Also submitted to this office was Exhibit B, which you assert is excepted from disclosure pursuant to section 552.107(1). Section 552.107(1) excepts from disclosure communications that reveal client confidences or the attorney's legal opinion, advice, or recommendation. Open Records Decision Nos. 589 (1991) at 1, 574 (1990) at 3, 462 (1987) at 9-11. We have reviewed the document and agree that Exhibit B may be withheld from disclosure pursuant to section 552.107(1).

You raised section 552.104 for other documents relating to GTECH, marked collectively as Exhibit C. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in a particular commercial context by keeping some competitors or bidders from gaining unfair advantage over other competitors or bidders. Open Records Decision No. 541 (1990) at 4. However, generally neither the contract nor information submitted with a bid is excepted under section 552.104 once the bidding process is over and a contract awarded. *Id.* at 5. As it appears that the contract has already been awarded to GTECH, section 552.104 is inapplicable to Exhibit C.

You informed this office that the documents in Exhibit C implicate GTECH's property interests. The documents include a letter, a summary of expenditures, and a list of suppliers used by GTECH. As provided by section 552.305, this office provided GTECH the opportunity to submit reasons as to why the information at issue should be withheld from disclosure. GTECH asserts that the documents are excepted from disclosure pursuant to section 552.110 of the Government Code.

Section 552.110 refers to two types of information: (1) trade secrets, and (2) commercial or financial information that is obtained from a person and made privileged or confidential by statute or judicial decision. In regard to the trade secret aspect of

section 552.110, this office will accept a claim that information is excepted from disclosure if a prima facie case is made that the information is a trade secret and no argument is submitted that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990) at 5; *see* Open Records Decision No. 542 (1990) (governmental body may rely on third party to show why information is excepted from disclosure). The Texas Supreme Court has adopted the definition of the term "trade secret" from the Restatement of Torts, section 757 (1939), which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list or specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

The following criteria determines if information constitutes a trade secret:

(1) the extent to which the information is known outside [the owner's business]; (2) the extent to which it is known by employees and others involved in [the owner's] business; (3) the extent of measures taken [by the owner] to guard the secrecy of the information; (4) the value of the information to [the owner] and to [its] competitors; (5) the amount of effort or money expended by [the owner] in developing the information; (6) the ease or difficulty with which the information could be property acquired or duplicated by others.

Id.; *see also* Open Records Decision No. 522 (1989).

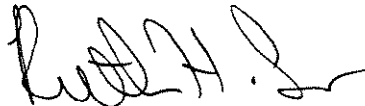
To show that information is protected commercial or financial information under section 552.110, a company must show that disclosure is likely to either impair the governmental body's ability to obtain information in the future or that it will cause substantial harm to the competitive position of the company. Open Records Decision No. 639 (1996). "To prove substantial competitive harm," as Judge Rubin wrote in *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted), "the party seeking to prevent disclosure must show by specific

factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure."

GTECH has made a prima facie case that the supplier list in Exhibit C is a trade secret. GTECH has also supplied sufficient information to demonstrate that the expense summary in Exhibit C is protected commercial or financial information. Thus, the supplier list and the expense summary must be withheld from disclosure pursuant to section 552.110 of the Government Code. However, GTECH has not demonstrated that the letter in Exhibit C is the type of information that is protected from disclosure under either prong of the section 552.110 exception. Thus, the letter in Exhibit C must be disclosed.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records.¹ If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/rho

Ref.: ID# 100742

Enclosures: Marked documents

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¹Please note that we do not address in this letter what effect, if any, that section 467.104 of the Government Code might have upon the exceptions in chapter 552 of the Government Code. We strongly recommend that you seek legislative guidance on this issue.